



# THE ATTORNEY GENERAL OF TEXAS

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ATTORNEY GENERAL

AUSTIN 11, TEXAS

Honorable Dan W. Jackson  
Criminal District Attorney  
Houston, Texas

Dear Sir:

Attention: Hon. W. K. Richardson

Opinion No. O-4533

Re: Can the county health officer and/or city health officer under Article 705c, Penal Code, demand that an actual Wasserman or blood test be made for syphilis, and an actual smear taken for gonorrhea? And related questions.

You have requested our opinion on various questions involving the interpretation of Article 705c of Vernon's Revised Penal Code of 1925. For the purposes of this opinion, we will quote the applicable provisions of this statute, and then restate your questions, and answer each in turn:

"Section 1, No person, firm, corporation, common carrier or association operating, managing, or conducting any hotel or any other public sleeping or eating place or any place or vehicle where food or drink or containers therefor, of any kind, is manufactured, transferred, prepared, stored, packed served, sold, or otherwise handled in this State, or any manufacturer or vendor of candies or manufactured sweets, shall work, employ, or keep in their employ, in, on or about any said place or vehicle, or have delivered any article therefrom, any person infected with any transmissible condition of any infectious or contagious disease, or work, or employ any person to work in, on or about any said place, or to deliver any article therefrom, who, at the time of his or her employment, failed to deliver to the employer or his agent, a certificate signed by a legally licensed physician, residing in the county where said person is to be employed, or is employed, attesting the fact that the bearer had been actually and thoroughly examined by such physician within a week prior to the time of such employment, and that such examination disclosed the fact that such person to be employed

was free from any transmissible condition of any infectious or contagious disease; or fail to institute and have made, at intervals of time not exceeding six months, actual and thorough examinations, essential to the findings of freedom from communicable and infectious diseases, of all such employees, by a legally licensed physician residing in the county where said person is employed, and secure in evidence thereof a certificate signed by such physician stating that such examinations had been made of such person, disclosing the fact that he or she was free from any transmissible condition of any communicable and infectious disease.

" . . .

"Sec. 3. All health certificates called for by this Act shall be displayed for public inspection at the place where the person named thereon is employed, and shall not be removed from such place during the continuance of such employment except by a public health officer, his duly appointed agent, or upon valid court order. All such certificates shall bear the employee's signature, the name of the physicians executing examinations and tests, and shall describe the color of eyes, and hair; height, weight, race, sex, age, and date of issuance, and shall be valid for six months only. Public health departments, and local lawmaking bodies, are hereby authorized to establish such further rules, regulations and ordinances as they may deem essential to the execution of the intentions of this Act; providing, however, that all conditions of this Act shall be requisite to all such regulations and ordinances, except, that the said authorities may adopt a plan for the registration of the physicians' certificates required by this Act and in lieu thereof issue a registration card to show that the person named thereon has complied with all of the provisions of this Act; providing further that the said registration card must bear the signature of the person named thereon and shall be displayed for public inspection at the place where such a person is employed.

"Sec. 4. The failure of any person, firm, corporation, common carrier or association engaged in any of the businesses described in this Act, to display at the place where any of the operations of such businesses are being conducted a valid health or registration certificate, as required by this Act, for each person employed in, on, or about such place, shall be prima facie evidence that the said person, firm, corporation, common carrier or association, in violation of requirements called for by this Act, failed to require

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the exhibition of the pre-employment health certificate, of such person and failed to institute and have made of such person, actual and thorough examinations necessary to the finds of freedom from communicable diseases at intervals of time not exceeding six months.

"Sec. 5. Whoever violates any provision of this Act shall be fined in an amount not exceeding Two Hundred Dollars (\$200). Each act or omission in violation of any of the provisions of this Article, shall constitute a separate offense and shall be punishable as hereinabove prescribed.

" . . . "

QUESTION NO. 1: Can the County Health Officer and/or City Health Officer, under Section 1 of the statute, demand that an actual Wasserman or blood test be made for syphilis, and an actual smear taken for gonorrhea?

This question is answered in the negative by our Opinions No. 0-213 and No. 0-1138, copies of which are attached hereto.

QUESTION NO. 2: If Question No. 1 is answered "no", is the physician who issues the certificates without making the blood test and smear subject to any penalty if it is later proved that the employee so alleged to have been examined by said physician actually had syphilis or gonorrhea at the time of examination?

This question is answered in the negative by our Opinion No. 0-1585, a copy of which is also attached hereto.

QUESTION NO. 3: Under Section 3 above quoted, are county health officers and/or city health officers authorized to issue regulations demanding blood tests to determine the presence of syphilis and smears to determine the presence of gonorrhea? If they cannot, then what officers or departments can issue regulations, and could they issue regulations demanding blood tests to determine the presence of syphilis and smears to determine the presence of gonorrhea?

In view of the fact that the only "public health department" created by law in this State is the State Department of Public Health created by Article 4414a, V.A.C.S., and which consists of the State Board of Health, the State Health Officer and his administrative staff, and the further fact that the State Department of Public Health is given "general supervision and control of all matters pertaining to the

health of citizens of this State, as provided herein," (Article 4419, R.C.S.) we think the Legislature in using the words "public health departments" could only have meant the State Department of Public Health. While provision is made by the statutes for county health officers (Articles 4422-4423) and city health officers (Articles 4424-4425), there is no statute making any provision for a county or city department of Health. Furthermore, such officers are officers of the State. *White v. City of San Antonio*, 94 Tex. 313, 60 S.W. 427. Each of such officers is amenable to the rules and regulations of the State Board of Health. (Articles 4427-4432, R. C. S.) This being true, it might logically be said that such officers are members of the administrative staff of the State Health Officer. In any event, we think the State Health Department is the only department that could have been included in the language of Article 705c. We are therefore of the opinion that the State Department of Public Health is authorized by this act to establish such rules and regulations requiring such laboratory tests for syphilis and gonorrhea as that department deems essential to the execution of the intentions of the act.

The same rule applies to the delegation of law-making power to "local lawmaking bodies." We know of no local lawmaking bodies within this State which could reasonably be held within the purview of this provision, other than the local governing bodies of incorporated cities, towns and villages, who have restricted powers to enact legislation (ordinances) affecting their respective jurisdictions. And the power of the Legislature, to delegate to cities, towns and villages, its authority to make laws for the protection of the public health, is amply upheld by the opinion of the San Antonio Court of Civil Appeals in the case of *Hanzel, et al., v. City of San Antonio, et al.*, 221 S.W. 237;

"If the ordinance that is assailed by appellants is one enacted, not for the purpose of the collection of taxes or public revenues, but for sanitary purposes and protection of the health of the public, it is not unconstitutional. The power to enact laws for these purposes is inherent in every sovereignty, and can be delegated by such sovereignty to agencies created by it for such purposes. The power to require licenses for the protection of the public health, decency, and morals, may be exercised by the state directly, or it may be done indirectly through a municipal corporation created by the state and clothed with such authority. *Cooley on Taxation*, c. 19, pp. 1125-1138."

This is an exhaustive opinion on this question, citing

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many authorities. Writ of error was refused by the Supreme Court. To the same effect is our Opinion No. 0-720, a copy of which is attached hereto.

It is our opinion that under the provisions of said Article 705c, and under the general police power, the governing bodies of incorporated Texas cities, towns and villages are authorized to enact ordinances designed to effectually prevent the spread of venereal diseases (provided, of course, that such ordinances do not conflict with the terms of said article), and that such ordinances may specify and require any reasonable tests for the detection of syphilis and gonorrhea.

QUESTION NO. 4: What is meant by the provision, in said Section 3, that the said authorities may adopt a plan for the registration of the physician's certificate and in lieu thereof, issue a registration card?

"Registration is the act of making a list, catalogue, schedule or register. The word 'registration' is an ordinary one. It is used in a generic sense, not technical. . . . " In re Supervisors of Election, 1 F. l, 5. This act, therefore, gives to the governing body of every incorporated city, town and village the power to pass ordinances adopting a plan for the making of a list, catalogue, schedule or register of physicians' certificates (commonly called "health cards") issued to its constituents, under the provisions of the act, and issuing in place of each such certificate a card "to show that the person named thereon has complied with all the provisions of this Act." The mechanics of the registration and the issuance of the cards is left to the discretion of the city commissioners or alderman, as the case may be.

QUESTION NO. 5: Can the physician be fined for not giving an actual, thorough examination where he issues a certificate over the telephone or to the employee in person without an examination?

This question is answered in the negative by our Opinion No. 0-1585, cited above and attached hereto.

QUESTION NO. 6: Can the employer be convicted (1) if he hires any person without a health certificate, or (2) hires any one with a health certificate knowing that said employee is infected, or (3) hires an employee who received a health certificate without any examination at all? (4) Can the employee be convicted even though he or she has a certificate, if it be proven that said employee did not take an actual physical examination, at the time knowing that he or

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she had a contagious disease?

Since this question is really four questions, we have taken the liberty of subdividing it and numbering its component parts, and will answer each by number.

Number (1) is made an offense by the plain provisions of the Act.

Number (2) is also made an offense under the Act, provided the employer knows that the employee is infected with a transmissible condition of an infectious or contagious disease.

Numbers (3) and (4) are not made penal offenses by any provision of this Act. But, relative to question number (4) we respectfully call to your attention Article 704, Section 1, Penal Code of 1925, as follows:

"Whoever violates any provision of this article shall be fined not less than five nor more than fifty dollars:

"1. No person infected with a venereal disease shall knowingly expose another to infection with any venereal disease, or perform an act which exposes another person to infection with such disease.

". . . ."

Yours very truly

ATTORNEY GENERAL OF TEXAS

s/ W. R. Allen

WRA:MBR  
Enclosures

By

W. R. Allen  
Assistant

APPROVED JUNE 13, 1942  
s/ Gerald C. Mann  
ATTORNEY GENERAL OF TEXAS

This opinion considered and approved in limited conference.